No. 533

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY S. NEUSTADT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (R. 9–11) is unreported. The opinion of the court of appeals (R. 57–66) is reported at 281 F. 2d 596.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1960 (R. 67). The petition for a writ of certiorari was filed on November 17, 1960, and was granted on December 19, 1960. 364 U.S. 926 (R. 68). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether an appraisal of private property by an appraiser of the Federal Housing Administration, made for purposes of insurance by the F.H.A. of a private mortgage, gives rise to an actionable duty of due care to one who later becomes a purchaser of the property.

2. Whether a claim by a purchaser of property, based upon a statement made to him of an F.H.A. appraisal inaccurately reflecting the value of the property, is excepted from the coverage of the Federal Tort Claims Act as a "claim arising out of * * * * misrepresentation."

STATUTES INVOLVED

1. Section 203 of the National Housing Act (Act of June 27, 1934, ch. 847, 48 Stat. 1248), as amended, 12 U.S.C. 1709 (1952 Ed., Supp. IV), provided in pertinent part as follows:[1]

> (a) The Commissioner is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon * * *.

[1] The present statute is the same except that the amounts and percentages in Section 203(b)(2), 12 U.S.C. 1709(b)(2) (1958 Ed., Supp. I), have been increased to permit the Commissioner to insure a greater proportion of the appraised value.

(b) To be eligible for insurance under this section a mortgage shall—

* * * * *

(2) Involve a principal obligation (including such initial service charges, appraisal, inspection, and other fees as the Commissioner shall approve) in an amount * * * not to exceed an amount equal to the sum of (i) 95 per centum * * * of $9,000 of the appraised value (as of the date the mortgage is accepted for insurance), and (ii) 75 per centum of such value in excess of $9,000 * * *.

* * * * *

2. Section 226 of the National Housing Act (Act of June 27, 1934, ch. 847), as added by the Housing Act of 1954 (Act of August 2, 1954, ch. 649, § 126, 68 Stat. 607), 12 U.S.C. 1715q, provides in pertinent part as follows:

The Commissioner is hereby authorized and directed to require that, in connection with any property upon which there is located a dwelling designed principally for a single-family residence or a two-family residence and which is approved for mortgage insurance under section 203 * * * of this Act, the seller or builder or such other person as may be designated by the Commissioner shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. * * *

3. The Federal Tort Claims Act provides in pertinent part as follows:

> 28 U.S.C. 1346(b)—
>
> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> 28 U.S.C. 2680(h)—
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * * *
>
> (h) Any claim arising out of * * * misrepresentation * * *.

STATEMENT

1. *The statutory scheme.*—By Section 203(a) of the National Housing Act,[2] the Federal Housing Commissioner (the head of the Federal Housing Administration) is authorized to insure any mortgage "eligible for insurance as hereinafter provided" and "to make commitments for the insuring of such mortgages prior to the date of their execution * * *." To

[2] 48 Stat. 1248, as amended, 12 U.S.C. 1709 (1952 ed., Supp. IV), in pertinent part, *supra*, pp. 2–3.

be eligible, a mortgage, *inter alia*, must not "exceed an amount equal to" specified fractions of "the appraised value of the property." These maximum levels reflect high loan-to-value ratios, in accordance with the congressional purpose to facilitate financing for the prospective homebuyer with limited capital.[3]

An application for insurance may be made only by a financial institution approved as a mortgage by the Commissioner.[4] Applications are commonly made in advance of execution of the mortgage[5] in order that the prospective seller may have his house approved for mortgage insurance although the buyer is unknown. This is acomplished by causing an approved lender to file with F.H.A. an application for a "conditional commitment" (R. 38). On receipt of such an application, the F.H.A. technical staff appraises the property (1) to determine whether it meets the standards of eligibility and (2) to fix a valuation for insurance purposes.[6] If the property is found eligible, the Commissioner agrees (in a conditional commitment) to insure a mortgage in an amount computed on the basis of the appraised value of the

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[3] H. Rept. 1922, 73d Cong., 2d Sess., pp. 1-2; H. Rept. 1429, 83d Cong., 2d Sess., p. 2; see Report of the President's Advisory Committee on Government Housing Policies and Programs, p. 2 (1953).

[4] Section 203(a), 12 U.S.C. 1709(a); 11 F.R. 177A-890, as redesignated, 13 F.R. 6443, 8260, 24 C.F.R. 200.4(a) (1949 ed.). All C.F.R. citations in this brief are to regulations in force at the time the transaction here in question occurred.

[5] See 19 F.R. 5045, 24 C.F.R. 221.9 (1958 Supp.).

[6] 24 C.F.R. 200.4(b) (1949 ed.); 24 C.F.R. 221.38 (1958 Supp.).

property, on the condition that the mortgagor is found financially able to carry the mortgage.'

As part of FHA's underwriting investigation, an appraiser visits the premises' (R. 38). His duties include inspection of the home to determine its general condition, in light of the eligibility and security requirements of F.H.A. (R. 42).[8] If the property does not meet these requirements, he may report that certain repairs or improvements should be made preconditions to eligibility, or may recommend rejection of the application after determination that the objectionable defect cannot feasibly be corrected (R. 40–43). If no such defects are found, he makes an appraisal based on the "long-term economic value" of the property.[9]

By Section 226 of the National Housing Act,[10] the Commissioner is directed to require that the seller of a single-family residence approved for insurance under Section 203 "shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner." Accordingly, the Commissioner's regulations require an application for mortgage insurance to be "accom-

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[7] R. 38; 11 F.R. 177A–890, as redesignated, 13 F.R. 6443, 8260, 24 C.F.R. 200.4(b)(2)(i) (1949 ed.); 19 F.R. 5045, 24 C.F.R. 221.12 (1958 Supp.).

[8] See H. Rept. 2271, 83d Cong., 2d Sess., p. 66.

[9] *Id.* at 67.

[10] As added by Section 126, Housing Act of 1954, 68 Stat. 607, 12 U.S.C. 1715q, reprinted in pertinent part, *supra*, p. 3.

panied by an agreement * * * executed by the seller" whereby he agrees that prior to any sale of the dwelling he "will deliver to the purchaser * * * a written statement * * * setting forth the amount of the appraised value of the property as determined by the Commissioner." [11]

Upon issuing a conditional commitment to a proposed mortgagee, the Commissioner also issues a separate document entitled "Statement of FHA Appraisal" (R. 53–54). This is the statement which must be furnished the purchaser before he enters into the contract to purchase, or, if it is not made available to the seller by that time, the contract must contain language to the effect that the purchaser will not be obligated to complete the purchase unless the seller has furnished such a statement setting forth an appraised value of not less than a designated amount (R. 53, 54).

2. *The facts of this case.*—In early 1957, Mr. and Mrs. Elmer Almquist, the owners of a single-family house and lot located in Alexandria, Virginia, in anticipation of selling the property, caused an approved lender to apply to the Federal Housing Commissioner for a conditional commitment to insure a mortgage (R. 15, 44). Pursuant to this application, an F.H.A. appraiser inspected the premises some time prior to March 14, 1957 (R. 2, 5, 15). An underwriting report was made, and the property was found to be eligible for mortgage insurance (R. 2, 5). The Commissioner thereupon issued to the applying lender a conditional

[11] 19 F.R. 5045, 24 C.F.R. 221.14 (1958 Supp.).

commitment based on an appraised value of $22,750 (R. 2, 5, 53–54).

The respondents became interested in the house after inspecting it on March 14, 1957 (R. 14, 24), and on April 9, 1957, entered into a contract for the purchase of the property at a price of $24,000 (R. 1, 5). Agreement was reached after preliminary negotiations, during the course of which the respondents were advised that F.H.A. had appraised the property for insurance purposes at $22,750 (R. 16). The contract was conditioned upon the respondents obtaining a loan, secured by an F.H.A.-insured mortgage, in the amount of $18,800.[12] The contract also provided that the sellers would deliver to the respondents, prior to the sale of the property, a written statement setting forth the appraised value of the property as determined by the Federal Housing Commissioner (R. 1, 5, 53–54).

On July 2, 1957, the settlement date, the respondents took title to the property and signed the written "Statement of FHA Appraisal" which they had been furnished (R. 18, 53–54). This document stated that the Commissioner "has appraised the property identified * * * and for mortgage insurance purposes has placed an FHA-appraised value of $22,750 on such

[12] This was the maximum amount insurable. Section 203 (b) (2), *supra*, p. 3, of the National Housing Act established a maximum insurable amount of $18,862.50 (95% of $9,000 plus 75% of $13,750) for an appraised value of $22,750, and the Commissioner by regulation required mortgages to be in multiples of $100. 19 F.R. 5045, 24 C.F.R. 221.17(a) (1958 Supp.).

property as of the date of this statement. (*The FHA appraised value does not establish sales price.*)" (Emphasis in original.) (R. 53.)

When respondents first visited the property on March 14, 1957, soon after the appraisal, they noted "that all of the interior walls and ceilings had been recently painted"; Mrs. Neustadt "noticed no cracks whatsoever in the plaster or paint on the interior walls, nor did she notice any exterior cracks," and Mr. Neustadt "was impressed with the cleanliness and excellent condition of the interior walls."[13] The exterior walls were "covered with ivy, almost completely," and the grounds were landscaped (R. 24–25).

Respondents were again at the house on July 2, 1957, the day of the settlement (R. 18). On this visit, Mr. Neustadt testified, their prime purpose was "to see whether possibly any redecoration was necessary" (R. 18). To that end they "inspected the house quite carefully," finding "absolutely nothing which would indicate the necessity for any redecoration at all. The walls, the interior walls of the house had all been relatively recently painted. We'd been told that they had been painted just before we first saw the house in March. House was immaculately clean and the walls and the ceilings, as I say, looked fine to us" (R. 19).

[13] G. Ex. 1, p. 2. Mr. Neustadt also stated that he "had only a very hurried view of the basement, and I don't recall noticing, during that visit, any cracks in the basement wall." *Ibid.*

Mr. Neustadt further testified that, on July 2, 1957, "for the first time," he noticed "a crack on the inside wall of the basement * * * but it was a crack which had been filled in or pointed up, and as I say, the house seemed to be in very nice condition" (R. 19).

Respondents moved into the house eight days later, on July 10, 1957 (R. 19). Shortly thereafter, the walls and ceiling of the house developed substantial cracks (R. 19–20). Respondents called on two plastering contractors and two builders who, after inspection, could report only that something substantial appeared to be wrong, but they could not determine what (R. 20–21). One suggestion was that the condition could have been caused by the roots of a large tree nearby, another that it could be attributable to water under and around the house (R. 21). An F.H.A. inspector next visited the house, at Mr. Neustadt's request, spending at least an hour investigating the condition (R. 21). He returned with two other men to continue his investigation (R. 22–23). Finally, the investigator returned once more with still another F.H.A. employee to pursue the matter still further (R. 22). They were met at the house by the original builder (R. 22). In search of the difficulty, the three men first dug into the ground on the outside of the house (R. 22). Where this proved of no avail, they dug through the concrete basement floor to examine the nature of the subsoil (R. 22). It was only then that the cause of the unusual settling was discovered to be the subsoil, which consisted of a type

of clay that, when exposed to water, quickly disintegrates (R. 22, 29, P. Ex 11)."[4]

3. *The proceedings below.*—On June 17, 1958, the respondents brought this action under the Federal Tort Claims Act in the United States District Court for the Eastern District of Virginia to recover the difference between the current market value of their house and the purchase price of $24,000 (R. 1–3). After a trial, the district court found that the respondents "in good faith relied upon the Commissioner's appraisal in consummating their contract of purchase," and that "reasonable care by a qualified appraiser would have warned them" of the serious structural defects which had been "preponderantly proved" (R. 10). The court held (R. 10) the government liable in the amount of $8,000, the difference between the fair market value of the property at the time of settlement ($16,000) and the purchase price ($24,000).

The Court of Appeals for the Fourth Circuit affirmed. The court accepted the government's contention that the exception to the Federal Tort Claims Act for "claim[s] arising out of * * * misrepresen-

[4] A civil engineer retained by the respondents, in mid-August 1957, testified that he determined the cause in the following manner (R. 29):

"I had one of my men drill an auger hole through a hole in the basement floor near the northeast corner of the basement down into the soil below and I observed that the basement floor had been placed on a cinder fill, that that cinder fill had water in it. I further observed that the clay, that there was clay under the basement floor and that this clay when it was wet as it was became plastic and pliable."

tation" in 28 U.S.C. 2680(h) (*supra*, p. 4) covers negligent as well as wilful misrepresentation (R. 59). The court held, however, that under the National Housing Act the government owed a specific duty of care to the respondents and that, although "there was an element of misrepresentation * * * under general common-law principles" (R. 65), the misrepresentation exception in 28 U.S.C. 2680(h) did not bar liability.

SUMMARY OF ARGUMENT

The courts below have held that every person whose purchase of property since the enactment of the Housing Act of 1954 was aided by F.H.A.-insured financing has the right to rely on the appraised valuation of his property as made by the F.H.A. and, if that valuation proves to have been negligently in error, the purchaser (through a suit instituted under the Federal Tort Claims Act, 28 U.S.C. 1346(b)) may recover from the federal government the difference between the true worth of the property and the erroneous evaluation. This holding, we submit, is erroneous, both because the F.H.A. owes no duty of due care to the prospective purchaser, and also because the Tort Claims Act expressly excepts "Any claim arising out of * * * misrepresentation".

I

Neither the terms of the Housing Act, as originally enacted and as amended, nor its legislative history indicate a congressional purpose to guarantee the value of property purchased with federally-aided financing or to protect the purchaser against a care-

less appraisal. On the contrary, the primary objective of the F.H.A. appraisal system was to aid the government in its insurance of mortgage loans. The protection of the government was foremost. It was recognized from the beginning, of course, that the various F.H.A. procedures, including the appraisal system, would help prospective purchasers in their dealings with sellers, but the controlling end of the appraisal program has always been the maintenance of a sound system of government insurance of the lender-mortgagee against loss.

No change was made by the addition, in the Housing Act of 1954, of Section 226, which directs the F.H.A. to require the seller or builder to deliver to the purchaser a written statement reflecting the amount of the appraised value as determined by F.H.A. The legislative history of this provision shows that Congress intended no more than to make available to the prospective vendee the same information then available to the vendor, as an anti-inflationary device and as a part of an overall attempt to rectify what Congress felt to be a general inequality in the bargaining position of the two parties. This intent is underscored by the attention given during the consideration of the 1954 Act, as well as during the preceding hearings, to the concept of the F.H.A. housing program as insurance of repayment running to the lender-mortgagee, rather than as a guarantee of construction and value running to the purchaser.

II

If, however, it be assumed, *arguendo,* that there exists a duty arising out of the F.H.A. appraisal upon which the purchaser would, at common law, have a right to institute an action, he has no such right under the Federal Tort Claims Act, the only pertinent waiver of sovereign immunity to federal tort liability. For the gravamen of the purchaser's cause of action is that the value of the property was misrepresented to him by the government, and "claim[s] arising out of * * * misrepresentation" are excepted from the Federal Tort Claims Act (18 U.S.C. 2680(h)).

A. It is clear that this exception for "misrepresentation" bars negligent, as well as wilful, misrepresentation. Five circuits have so held, and this interpretation is supported by the structure of the Tort Claims Act, its history, and the general principles of tort law.

B. Despite respondents' contention that their claim is basically for the negligent making of the F.H.A. appraisal, it is plain that the communication of the inaccurate appraisal is an indispensable element in their cause of action. Without that communication, they would have no claim. In comparable circumstances, the lower federal courts have regularly refused to allow plaintiffs to avoid the exclusionary provisions of the Tort Claims Act, including the "misrepresentation" exception, by formulating claims in artificial terms. In particular, with respect to misrepresentation the common-law decisions likewise in-

dicate that that tort includes negligence in ascertaining the facts, as well as lack of due care in the transmission of information. Until the instant case, the federal courts have applied the same principles under the Tort Act. To hold otherwise would be to cut the core from the "misrepresentation" exception of Section 2680(a), and to welcome a mass of suits against the government for supplying erroneous information—actions which Congress desired to exclude from its waiver of immunity in the Tort Act.

ARGUMENT

I

THERE EXISTS NO ACTIONABLE DUTY ON THE PART OF THE GOVERNMENT, TO A PURCHASER OF PRIVATE PROPERTY, ARISING OUT OF A FEDERAL HOUSING ADMINISTRATION APPRAISAL MADE FOR PURPOSES OF GOVERNMENT INSURANCE OF A PRIVATE MORTGAGE

Our first position is that the Federal Housing Administration, in making its appraisals of property, owes no actionable duty of due care to subsequent or prospective purchasers of the property. Rather, the inspections and appraisals are made primarily to aid the government in determining whether and how much to insure the prospective morgage loan. No rights against the United States accrue to the prospective purchaser if the inspection or appraisal should happen to be negligently made. The government may find that it has insured the loan for too high an amount, but the private purchaser has no legal redress against the United States.

A. The portion of the National Housing Program with which we are here concerned [15] consists of the insuring or guaranteeing of mortgages by the Federal Housing Administration. This insurance runs to a lender-mortgagee, upon whose application it is granted. *Supra,* pp. 4–6.[16] During consideration of the original Housing Act in 1934, Senator Barkley explained that, because of "the guaranty of approved mortgages, more private capital will be induced to go into these lending institutions for the purpose of putting loans on homes." [17] Senator Barkley added that the purpose of the Act was "to have the fear taken out of the investor." [18] The mechanism, it was explained, would be through "a guarantee of mortgages." [19]

It was contemplated that this program would not be at the expense of the public treasury.[20] The insurance would be financed by an annual premium charged to the mortgage.[21] In addition, any mortgagee who foreclosed on a mortgage, and received the benefit of the insurance provision, was required to transfer to the Federal Housing Administration the

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[15] Section 203 of the National Housing Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709, *supra*, pp. 2–3.

[16] Section 203(a) of the Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709(a).

[17] 78 Cong. Rec. 11980.

[18] 78 Cong. Rec. 11981.

[19] 78 Cong. Rec. 11981.

[20] 78 Cong. Rec. 11983.

[21] Section 203(a) of the Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709(a).

title to the property, which the Administration could then manage or dispose of for the financial benefit of the insurance fund.[22]

Moreover, the mortgagee was required to assign to the Administration any claims which it possessed against the mortgagor or others arising out of the mortgage transaction or the foreclosure proceedings.[23] Thus, as was stated several years later by the House Committee on Banking and Currency,

> In the case of the FHA-insured-mortgage system, the contingent liability of the Government is protected, in the final analysis, by the value inherent in the properties underlying the mortgages the FHA insures.[24]

As an integral part of the protection of the government, Congress provided that, to be eligible for government insurance, the mortgage must involve no more than a certain percentage of the "appraised value of the property."[25] This appraisal, it was said by the House managers in the conference committee that reported out the bill which became the Housing Act of 1954 (see *infra*, pp. 20–29), is

> obviously essential to the proper underwriting of mortgage loan risks, and therefore oper-

[22] Sections 204 (a) and (g) of the Act, 48 Stat. 1249, 1250, as amended, 12 U.S.C. 1710 (a) and (g).

[23] *Ibid.*

[24] H. Rept. 1686, 81st Cong., 2d Sess., pp. 32–33.

[25] Section 203(b) of the Act, 48 Stat. 1248, as amended, 12 U.S.C. 1709(b).

> ate[s] primarily for the protection of the Government and its insurance funds.[26]

B. Of course, it was early recognized that the government appraisal of the property, the mortgage on which was to be insured, along with other features of the mortgage-insurance program, would operate to the benefit of the prospective purchaser, as well as the government. In the 1934 debates on the first Housing Act, Senator Barkley stated that the Act "will take the fear very largely out of the home owner, as well as out of the investor."[27]

The F.H.A. in its first annual report recognized that through the mortgage-insurance program the "borrower receives substantial protection against the kind of mistakes in judgment which are likely to be made by a family not experienced in buying a home, or in home property values."[28] An important element of this protection was described as follows:

> He [the borrower] will also have what probably only a small percentage of home buyers have ever had in the past: the benefit of knowing the appraised value set upon the property which he intends to buy or build, by a trained

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[26] H. Rept. 2271, 83d Cong., 2d Sess., p. 66. In its first report, the F.H.A. stated that "[i]nsurance is granted" only for a "sound loan," which must meet two requirements: "(1) it must be one which the borrower reasonably can be expected to repay * * *; (2) it must be secured adequately by a dwelling the value of which will reasonably protect the gradually diminishing outstanding principal, with a fair margin of safety." 1st Annual Report of the Federal Housing Administration, 15 (1935).

[27] 78 Cong. Rec. 11981.

[28] 1st Annual Report of F.H.A., 17 (1935).

> valuator acting in accordance with a procedure designed to reduce to a minimum errors that might result from casual or hasty conclusions.[29]

A second benefit to the home buyer from the F.H.A. appraisal, early recognized, was that the "[p]urchase of homes at inflated values will tend to be discouraged. This will exert a powerful influence against speculative booms in real estate * * *."[30]

But nowhere in the legislative consideration was there ever any hint that the government was insuring or guaranteeing or representing to the home purchaser that he was receiving a certain value for his property. The Housing Act, its rather extensive legislative history, and the reports of the F.H.A. all show that Congress so far as the F.H.A. appraisal was concerned—and apart, of course, from the need and desirability of stimulating building construction and making homes available to millions who otherwise could not afford to purchase them—intended only to guarantee to lenders the repayment of amounts loaned. The incidents of this program, including the appraisal, were primarily designed to that end. Any other tangential benefits to the purchaser were recognized and welcomed, but the controlling aim of the

[29] *Ibid.* See also 90 Cong. Rec. A2985; 2d Annual Report of F.H.A., 6; 4th Annual Report, 15; 5th Annual Report, 21; 6th Annual Report, 9; 11th Annual Report, 9; 12th Annual Report, 8. And see also, Hearings before the Senate Committee on Banking and Currency on the National Housing Act, 73d Cong., 2d Sess., at 58, 127; Hearings before the House Committee on Banking and Currency on Amendments to National Housing Act, 75th Cong., 2d Sess., at 84; Hearings before the House Committee on Banking and Currency on Amendment of the National Housing Act, 78th Cong., 1st Sess., at 8.

[30] 1st Annual Report of F.H.A., 18; see also 2d Annual Report of F.H.A., 6.

program, in the view of Congress, was to make available mortgage fianancing with which homes could be obtained.

C. In 1954, Congress added Section 226 to the National Housing Act (*supra*, p. 3).[21] This section, on which the court below relied heavily (R. 63), directs the F.H.A. to require the seller or builder of any property the financing of which is insured under this program to deliver to the purchaser a written statement setting forth the amount of the appraised value of the property as determined by the F.H.A. This provision made no change in the F.H.A. appraisal system. Nor did it alter the housing program from one of insurance of repayment of mortgages to one of warranty of construction or guarantee of value received by the purchaser, or give the purchaser a legal right to an accurate appraisal.

1. The terms of Section 226 do not purport to bind the government in any way, or to award the purchaser any rights against the government. All that the section provides is that the F.H.A. shall require the seller to make available to the purchaser a written statement of the F.H.A.-appraised value of the property. On its face the provision does no more than assure that the seller passes on to the purchaser the F.H.A.'s appraisal which is to form the basis of the government's guarantee of the loan. There is no suggestion in the language of the section that the

[21] Section 226 of the Housing Act of 1954, 68 Stat. 607, 12 U.S.C. 1715q (1952 ed. Supp. IV). A 1957 amendment to Section 226 is immaterial in its content; also, it was enacted after the transaction with which we are here concerned. Section 115 of the Act of July 12, 1957, 71 Stat. 298, 12 U.S.C. 1715q.

government, which theretofore had not been liable to the purchaser for a faulty or defective appraisal, was now to be responsible in damages to the purchaser. The purpose would appear to be only to give the purchaser the benefit of certain information (*i.e.*, the F.H.A. appraisal) which he might not have obtained under the seller's prior practice.

2. The legislative history of the section furnishes support for the conclusion, suggested by the bare words of the provision, that Congress intended to give the purchaser additional protection *against the seller,* not to establish a new liability on the part of, and remedy against, the United States.

a. Section 226 was written as a part of an attempt by Congress to correct abuses (on the side of sellers) that had appeared in the housing program, and to prevent the liberalized credit terms in the 1954 Act from causing higher prices for houses instead of providing lower income groups with increased opportunity to purchase homes, as Congress intended.

Prior to the enactment of the 1954 Act, Congress had recognized that many purchasers under the F.H.A. program were receiving homes that soon became uninhabitable because of slipshod construction methods or other failures to construct the houses in accord with approved specifications. Others in this program and in the F.H.A. home-modernization program were being defrauded by overcharges and by assertions that a

particular contractor or home was F.H.A.-approved.[32] As the Senate Committee report indicates, these abuses "were at the expense of the borrower."[33]

Because of these disclosures, Congress was concerned with improving the protection available to the borrower—the home purchaser (under the mortgage-insurance program of Title II of the Housing Act) and home owner (under the home improvement loan insurance program of Title I)—*in relation to the seller or contractor,* so as to protect the borrower from "being taken advantage of by salesmen and dealers and bankers and others."[34] Congress was also concerned lest the purpose of the more liberal financing provided in the 1954 Act,[35] which was intended to have

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[32] See, generally, Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency on Housing Constructed under VA and FHA Programs, 82d Cong., 2d Sess.; Hearings Before Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 1303–2029; S. Rept. 1472, 83d Cong., 2d Sess., 2; H. Rept. 2271, 83d Cong., 2d Sess., 63; 8th Annual Report, Housing and Home Finance Agency, 6–7, 92–93 (1954); 100 Cong. Rec. 12352.

[33] S. Rept. 1472, 83d Cong., 2d Sess., 11.

[34] Hearings Before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., at 1441. See also *id.* at 1454, 1654, 1656, 1700; S. Rept. 1472, 83d Cong., 2d Sess., 94; Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency on Housing Constructed Under VA and FHA Programs, 82d Cong., 2d Sess., 39–40, 41, 80, 82–83, 112, 132; Hearings Before House Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 211–212.

[35] Section 104 of the Act, 68 Stat. 591, amending Section 203 of the National Housing Act, 12 U.S.C. 1709(b), raised (1) the maximum permissible ratios of loans to appraised values of existing homes to 90 percent of the first $9,000 of value plus 75 percent of the balance from the previous maximum of 80 per-

the result of lowering down-payments,[36] be thwarted. Though these liberalizing provisions were designed "to bring home ownership within the reach of more families,[37] Congress had received testimony that, without adequate safeguards, "unwarranted and unintended price increases" would result in "diverting the benefit from the buyer to the seller and negating the purpose." [38]

This double concern for strengthening the hand of the buyer *as against the seller* and for preventing the frustration of the purpose of the liberalized credit terms resulted, for one thing, in the requirement that the seller inform the buyer of the appraised value of the property. The purpose of this provision was to help the prospective purchaser in his negotiations with the seller. This seems clear from the committee reports.

The Senate committee, which inserted this section in the 1954 Housing Act, explained its action in the same terms used in the hearings: "With the more lib-

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cent, and (2) raised the maximum dollar amounts of mortgages eligible for insurance. In addition, Section 105 extended the maximum mortgage term to thirty years.

[36] See S. Rept. No. 1472, 83d Cong., 2d Sess., 17–18; H. Rept. No. 1429, 83d Cong., 2d Sess., 3–5, 12–13.

[37] Hearings Before the House Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 300; see, to the same effect, S. Rept. 2271, 83d Cong., 2d Sess., 67; H. Rept. 1429, 83d Cong., 2d Sess., 12–13; 100 Cong. Rec. 7612, 7617.

[38] Hearings Before the House Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 300; Hearings Before the Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 948.

eral FHA terms and now that mortgage funds are easier to obtain, both agencies [FHA and VA] must be extra careful lest they allow these liberal credit provisions to be translated, even gradually, into higher valuations."[39]

The same reasoning was used by the managers on the part of the House in explaining to the House the "importance" of accepting this appraisal-statement provision:

> [B]y providing the new and more liberal mortgage insurance terms contained in the conference substitute, the Congress is seeking to benefit the individual families seeking to buy homes. The committee of conference desires to assure that these terms would not have an inflationary effect upon the going market prices for homes which might be reflected in upward pressure on prices which, in turn, might be reflected in FHA valuations. An appraisal system, such as FHA's, based on long-term economic value would preclude valuations in excess of carefully estimated replacement costs as an upper limit in respect to new homes, and in excess of replacement cost, less deterioration, in respect to existing homes.[40]

The court below referred (R. 64) to the House managers' accompanying statement that "FHA procedures also operate for the benefit and protection of

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[39] S. Rept. No. 1472, 83d Cong., 2d Sess., 19.

[40] H. Rept. 2271, 83d Cong., 2d Sess., 67. As a second reason for the acceptance of the provision, the committee stated that "in those cases where a reasonable and careful estimate of the costs required to reproduce a fully comparable residential property may, for one reason or another, be less than the current market price for such properties, the individual consumer would obtain the benefit thereof * * *." *Ibid.*

the individual home buyer", and the discussion of Section 226 in that connection, as supporting the view that rights against the government were intended to be accorded by the new provision. But at the same time the managers made clear that the F.H.A. appraisal system (as well as many of its other procedures) "operate primarily for the protection of the Government and its insurance funds" and they recognized "the fact that, technically there is no legal relationship between the FHA and the individual mortgagor" (H. Rept. 2271, *supra,* at pp. 66–67). It seems plain that the emphasis on the protection of the purchaser was intended, not to impose legal liability on the government, but to stress the aid Congress intended to give purchasers vis-à-vis sellers.

In sum, this provision of Section 226, in line with the general philosophy of the 1954 Act,[41] was intended

[41] Other provisions of the Act which accord with this general philosophy include Section 101(a), 68 Stat. 590, providing for lender liability in Title I loan losses, see H. Rept. No. 2271, 83d Cong., 2d Sess., 64; Section 126, 68 Stat. 607, requiring a builder's cost certificate and limiting the mortgage to the maximum percentage of "actual cost"; Section 131, 68 Stat. 609, prohibiting the false or misleading use in advertising of the name of any federal housing agency; and see, in particular, Section 801, 68 Stat. 642, providing with respect to *new* construction, that the "*seller* or *builder*" (emphasis added), rather than the United States, furnish to the purchaser "a warranty that the dwelling is constructed in substantial conformity with the plans and specifications (including any amendments thereof, or changes and variations therein, which have been approved in writing by the Federal Housing Commissioner of the Administrator of Veterans' Affairs) on which the Federal Housing Commissioner or the Administrator of Veterans' Affairs based his valuation of the dwelling * * *." If, as to new homes, Congress required that only the seller, and not the United States, furnish the purchaser with a warranty of construction,

to furnish the home buyer with some additional protection against the seller—in this instance, to see that the purchaser obtained information already given to the seller (the F.H.A. statement of appraisal), information which would help the purchaser obtain the property at a fair price reasonably related to enduring elements of value. But there is no indication in the words of the Act or in its legislative history that Congress intended in 1954 to transform the underlying concept of national housing legislation from a system of "guarantee of mortgages" [42] to one of warranty by the government of construction, or guarantee by the government of value received, or of a right in the purchaser to go against the government for failure to give correct appraisal information. It is hardly to be presumed that such a major shift would occur without some positive evidence that it was intended.

b. The legislative history shows that Congress had no such intention. During the hearings leading up to the 1954 Act, there was repeated emphasis that no relationship existed between the government and the purchaser, the builder, or the vendor—the government's role was only in the insuring of mortgages to the lender, rather than the guarantee of construction or the soundness of the purchase. Representative Dollinger, for example, declared:

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it cannot be assumed—as respondents in effect contend here—that, as to *old* buildings or existing homes, Congress intended to have the construction guaranteed by the United States rather than by the seller alone.

[42] 78 Cong. Rec. 11981. This term was used by Senator Bulkley in response to a question by then Senator Black during the debates on the original Housing Act in 1934.

> The Government did not guarantee, on your getting the home, that the home would be in good condition. / As I pointed out before, there has been a misconception of the idea. The Government never approved the building. All it says is that the FHA loans are guaranteed to the builder or to the bank.[43]

The same question was discussed during the Senate committee's consideration of the 1954 Act, and the same answer was given. In a colloquy with Housing and Home Finance Administrator Cole, Senator Bennett asked:

> I think if we are going to eliminate the possibilities of fraud, we have to do something to make sure that the customer, the borrower, the actual man who signs the note, realizes the limitations of the FHA insurance and is put definitely on notice that the insurance runs to the lender and it is not a protection or a guaranty to him of the workmanship.
>
> We have been talking about title I, today, mostly. Doesn't the same situation exist in the buildings that are built under title II?
>
> Mr. COLE. I think so.
>
> Senator BENNETT. As a Senator, I have had some complaints which would indicate that either through the negligence of the builders or maybe implicit in their silence, there has developed a feeling that a man who has a home built under an FHA-guaranteed or insured mortgage, is somehow protected by the Federal Government and that the Federal Government

[43] Hearings Before the Subcommittee on Housing of the House Committee on Banking and Currency on Housing Construction Under VA and FHA Programs, 82d Cong., 2d Sess., 163; see to the same effect, *id.* at 3–4, 39–40, 41, 84, 85, 109, 117, 125–126, 147, 157–58.

will, if necessary, make sure that his home is exactly as he expected it to be.

Now, does the FHA have the responsibility?

Mr. Cole. * * * I agree with the Senator that the home buyer should understand that the Federal Government is not guaranteeing his home.

Senator Bennett. That is correct. Let's go back to this inspection service for a minute—this, of course, is outside of title I, because there is no inspection and there is no appraisal in title I.

The idea of the inspection service under title II is to protect the Federal Government, which undertakes to insure the loan. The fact that the inspection is made, provides collateral benefits to the property owner. There is no question about that. But in the last analysis the property owner cannot say to the Federal Government, "Well, your inspector inspected my house, and now look what's happened; therefore, you are responsible; therefore, you must come down here and fix it up."

Isn't that a correct statement of the limitation?

Mr. Cole. I think so."[44]

This colloquy underscores what is apparent from a reading of the entire legislative history of this Act: Congress was concerned with protecting the borrower against "being taken advantage of by salesmen and dealers and bankers and others";[45] there was no pur-

[44] Hearings Before the Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 1402–1403.

[45] Hearings, Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., 1441; see also *id.* at 1454, 1654, 1656, 1700.

pose or design to impose upon the federal government, and therefore the general taxpayer, the legal duty to guarantee to each buyer under a federally-insured financing program a certain valuation of the property he contemplated purchasing, or to assure him that the federal appraisal was carefully made, or to give him a legal remedy against the government for a faulty valuation. The Congress was concerned with giving the buyer certain tools with which he could protect himself against unscrupulous builders or vendors; it did not intend to provide tools for use against the government itself."

3. In these circumstances, Congress' inclusion of Section 226 in the Housing Act of 1954 did not create a duty of due care on the part of the government with respect to the prospective purchaser. In the general law of torts, such a duty arises only where the purpose is primarily and predominantly to protect the third party, not where the dominant purpose of the action or conduct is to protect the actor himself. This is true, in contract law, with respect to third party beneficiaries. It is also true in the private law of torts with respect to third parties who are only incidentally sought to be benefited by actions taken by the person charged with not exercising due care. For instance, in the classic case of

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[46] The magnitude of the government's possible liability, if it could be sued for failure to make a proper appraisal, can be gauged from the fact that, in 1959 alone, some 495,172 mortgages in an aggregate amount of $6,069,418,000, were insured by the F.H.A., following disclosure to the mortgagor of the F.H.A.-appraised value of the property in accordance with Section 226.

Ultramares Corp. v. *Touche*, 255 N.Y. 170, 183, Chief Judge Cardozo said: "In the case at hand, the service was primarily for the benefit of the Stern company [the company ordering the accountants' report], a convenient instrumentality for use in the development of the business, and only incidentally or collaterally for the use of those to whom Stern and his associates might exhibit it thereafter. Foresight of these possibilities may charge with liability for fraud. The conclusion does not follow that it will charge with liability for negligence." See *infra*, pp. 44–45. In the light of the clear purpose of Congress to protect the government primarily, and only incidentally to help the prospective purchaser, by the provision for a F.H.A. appraisal, this principle is directly applicable here.

II

APPELLANTS' CLAIM, IF ACTIONABLE AT ALL, IS ONE "ARISING OUT OF * * * MISREPRESENTATION" AND THEREFORE EXPRESSLY FALLS OUTSIDE THE WAIVER OF SOVEREIGN IMMUNITY IN THE FEDERAL TORT CLAIMS ACT

Even if Section 226 of the National Housing Act is deemed to create an actionable duty on the part of the government toward a purchaser of residential property under the F.H.A. program—a duty which is violated by lack of due care in the appraisal of property for mortgage insurance purposes—respondents' claim against the United States still must fail. For the claim falls within a class as to which Congress has expressly refused to waive the sovereign im-

munity to suit of the United States: claims "arising out of * * * misrepresentation."

INTRODUCTORY

With certain limited exceptions,[47] the federal government prior to 1946 had an "all-encompassing immunity from tort actions." *Rayonier, Inc.* v. *United States,* 352 U.S. 315, 319. In 1946, after "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment,"[48] Congress enacted the Federal Tort Claims

[47] See, for example, Public Vessels Act of March 3, 1925, 43 Stat. 1112, 46 U.S.C. 781; Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741.

[48] *United States* v. *Spelar,* 338 U.S. 217, 219–220. From 1925 through 1946, when the Federal Tort Claims Act was adopted, some 32 such bills were introduced: 68th Cong.: H.R. 12178 and H.R. 12179 (66 Cong. Rec. 3090); 69th Cong.: S. 1912 (67 Cong. Rec. 1233), H.R. 6716 (67 Cong. Rec. 1552) and H.R. 8914 (67 Cong. Rec. 3339); 70th Cong.: H.R. 9285 (69 Cong. Rec. 1468); 71st Cong.: S. 4377 (72 Cong. Rec. 8489), H.R. 15428 (74 Cong. Rec. 1073), H.R. 16429 (74 Cong. Rec. 2881), H.R. 17168 (74 Cong. Rec. 5342); 72d Cong.: S. 211 (75 Cong. Rec. 191), S. 4567 (75 Cong. Rec. 9540), H.R. 5065 (75 Cong. Rec. 263); 73d Cong.: S. 1833 (77 Cong. Rec. 4962), H.R. 129 (77 Cong. Rec. 88), H.R. 8561 (78 Cong. Rec. 4101); 74th Cong.: S. 1043 (79 Cong. Rec. 442), H.R. 2028 (79 Cong. Rec. 50); 76th Cong.: S. 2690 (84 Cong. Rec. 7834), H.R. 7236 (84 Cong. Rec. 9207); 77th Cong.: S. 1743 (87 Cong. Rec. 5994), S. 2207 (88 Cong. Rec. 417), S. 2221 (88 Cong. Rec. 586), H.R. 5185 (87 Cong. Rec. 5579), H.R. 5299 (87 Cong. Rec. 6024), H.R. 5373 (87 Cong. Rec. 6234), H.R. 6463 (88 Cong. Rec. 691); 78th Cong.: S. 1114 (89 Cong. Rec. 4500); H.R. 817 (89 Cong. Rec. 50), H.R. 1356 (89 Cong. Rec. 250); 79th Cong.: H.R. 181 (91 Cong. Rec. 21), and S. 2177, the "Legislative Reorganization Act," Title IV of which was the Federal Tort Claims Act, enacted as Public Law 601, approved Aug. 2, 1946.

Act, 28 U.S.C. 1346(b), and thereby "waived sovereign immunity from suit for certain specified torts of federal employees." *Dalehite* v. *United States*, 346 U.S. 15, 17. One of the chief purposes of the Act was to make the United States amenable to suit for "ordinary" "common law" torts. That purpose was expressly reaffirmed when the Act was finally passed.[49] But there were certain areas in which Congress did not want to expose the federal government to tort liability.[50] To this end, almost from the first, the bills contained several express exemptions to the assumption of liability. These exceptions were ultimately embodied in Section 421 of the enacted bill, 60 Stat. 842, 845, and now appear in 28 U.S.C. 2680.

At this date there is no room for challenging the traditional and "accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it." *Dalehite* v. *United States*, 346 U.S. at 30; *Feres* v. *United States*, 340

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[49] See, *e.g.*, 67 Cong. Rec. 11092, 11100, 69 Cong. Rec. 2192, 3118; Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill (Feb. 1932), p. 17; Hearings on H.R. 7236, 76th Cong. 3d Sess. (April 1940), p. 16; Hearings on S. 2690, 76th Cong., 3d Sess. (March 1940), pp. 27–8; Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. (Jan. 29, 1942), pp. 28, 37, 39, 66; H. Rept. No. 2428, 76th Cong., p. 3; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5; S. Rept. No. 1400, 79th Cong., p. 31.

[50] See, *e.g.*, 67 Cong. Rec. 11086–11100; 69 Cong. Rec. 2191, 2196, 3117, 3127; H. Rept. No. 2800, 71st Cong., p. 9; 86 Cong. Rec. 12021–2; Hearings on H.R. 5373 and H.R. 6463, 77th Cong. (Jan. 1942), pp. 28, 33, 38, 45, 65, 66; S. Rept. No. 1196, 77th Cong., p. 7; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5.

U.S. 135, 139; *United States* v. *Shaw*, 309 U.S. 495; *United States* v. *Eckford*, 6 Wall. 484. Nor can there be any challenge to the corollary of that principle—although Congress in the Federal Tort Claims Act, 28 U.S.C. 1346(b), has authorized suit against the United States for many classes of tortious conduct by federal employees, this authorization does not apply to those classes of torts specifically exempted in 28 U.S.C. 2680. As this Court has stated, "since petitioners obtain their 'right to sue from Congress [* * * they] necessarily must take it subject to such restrictions as have been imposed.'" *Dalehite* v. *United States*, 346 U.S. at 31, quoting from *Federal Housing Adm'n* v. *Burr*, 309 U.S. 242, 251. Cf. *Soriano* v. *United States*, 352 U.S. 270, 273–275.

One of these specific exceptions from coverage—that relating to "misrepresentation"—applies directly to this case.

A. CLAIMS ARISING OUT OF NEGLIGENT MISREPRESENTATION ARE BARRED BY SECTION 2680(h) OF THE TORT CLAIMS ACT

The Tort Claims Act provides in 28 U.S.C. 2680(h) (emphasis added):

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit,* or interference with contract rights.

Respondents contended in the courts below, and in their brief in this Court in opposition to the grant of certiorari, that the exception as to "misrepresentation" applies only to wilful and not to negligent misrepresentation. Such a narrow reading of the exception is contrary to its clear meaning and to the unanimous holding of five courts of appeals in seven cases.[51] Respondent's contention, therefore, was properly rejected by the court below.

The fact that Congress in Section 2680(h) excluded not only claims arising out of "deceit" but also those arising out of "misrepresentation" indicates a purpose to bar from the Act's coverage both claims based upon deliberate misrepresentation and also those founded upon negligent or innocent misrepresentation. If only deliberate misrepresentations were to be barred, "deceit" alone would have sufficed. The word "misrepresentation," if it is to have any significance,[52] must be construed as something in addition to deceit or deliberate misrepresentation.

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[51] *Jones* v. *United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921; *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 275–276 (C.A. 8), certiorari denied, 347 U.S. 967; *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9); *Miller Harness Co.* v. *United States*, 241 F. 2d 781 (C.A. 2); *Anglo-American and Overseas Corp.* v. *United States*, 242 F. 2d 236 (C.A. 2); *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10); and the instant case (R. 59–60).

[52] "Congress is not to be presumed to have used words to no purpose. * * * [A] legislature is presumed to have used no superfluous words. Courts are to accord a meaning if possible, to every word in a statute." *Platt* v. *Union Pacific R.*, 99 U.S. 48, 58; *62 Cases More or Less* v. *United States*, 340 U.S. 593.

In that connection, it should be noted that most jurisdictions, at least since *Derry* v. *Peek*, L.R. 14 App. Cas. 337, 58 L. J. Rep. Ch. 864 (1889), recognize that deceit will not lie for a negligent misrepresentation,[53] and it is fair to assume that Congress was aware of this rule of law when it added "misrepresentation" to "deceit." Similarly, it may be assumed that the legislators were aware that "misrepresentation" encompasses a field of torts which is "considerably broader than the action for deceit. *Liability in damages for misrepresentation*, in one form or another, falls into the three familiar divisions. * * *—it may be based upon intent to deceive, *upon negligence*, or upon a policy which requires the defendant to be strictly responsible for his statements without either." Prosser, *Torts*, 704, 707, 726 (1941) (emphasis added); see Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 Harv. L. Rev. 733, 737–738 (1929); compare *Restatement of Torts*, §§ 525, 552. When Congress used the word "misrepresentation" in conjunction with and contradistinction to "deceit", the purpose was to encompass this area of torts based upon negligent misrepresentation.

The legislative history of this exception to the Tort Claims Act, 28 U.S.C. 2680(h) is consistent with this construction. As we have noted,[54] bills dealing with tort claims had been introduced in Congress since 1923. An exclusionary section virtually identical with 28 U.S.C. 2680(h) first appeared in 1931,[55] and there-

[53] Prosser, *Torts*, 718 (1941).

[54] See note 48, *supra*, p. 31.

[55] Section 206, S. 211, 72d Cong., 1st Sess.

after almost every subsequent tort claims bill carried a similar exception. But there was no explanatory comment until 1940,[56] at which time the hearings contain a statement of the Department of Justice:

> It excepts from the scope of the act a series of torts as to which, for the time being at least, it may be dangerous for the Government to subject itself to suit, until in any event considerable experience has been had under the proposed legislation.[57]

Alexander Holtzoff, then representing the Department, testified:

> Clause 9 proposes to exclude from the cognizance of the law claims arising out of assault, battery, false imprisonment, false arrest, and so forth, a type of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts. It includes assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.[58]

Referring to the bill which was finally enacted, the Senate Committee stated in its report:

> This section [28 U.S.C. 2680] specifies *types* of claims which would not be covered by the

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[56] The clause was then Section 203(9), S. 2690, 76th Cong., 1st Sess.

[57] Hearings Before Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess., p. 13.

[58] *Id.* at 39.

> title. They include * * * deliberate torts such as assault and battery; *and others.*[39]

Respondents' position that Section 2680(h) does not apply to claims of negligent misrepresentation is premised on the incorrect assumption that all of the other torts specified in Section 2680(h) are deliberate or intentional wrongs. Actions for libel or slander, two of the torts specifically outlawed by Section 2680(h) as a basis for recovery under the Tort Claims Act, may obviously be based on negligent rather than intentional defamation. Even in the absence of any intent to defame, it is settled that liability attaches for publishing the defamation. *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260; *Smith* v. *Utley*, 92 Wisc. 133, 65 N.W. 744; see Prosser, *Torts* (1941 ed.), Sec. 93, p. 818.

Inclusion of "interference with contract rights" in Section 2680(h) also shows that the exception was not intended to be limited to intentional torts. Damages have been regularly allowed for negligent interference with contract rights. Thus, telegraph companies have been held liable for interference with contract rights, caused by negligent transmissions of messages. *Western Union Tel. Co.* v. *Bowman*, 141 Ala. 175, 37 So. 493; *McPherson* v. *Western Union Tel. Co.*, 189 Mich. 471, 155 N.W. 557. And where a child has been injured through negligence, the parent may of course recover for loss of the child's services.

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[39] S. Rep. No. 1400, 79th Cong., 2d Sess. 33; see H. Rep. No. 1287, 79th Cong., 1st Sess. 6. (Emphasis added.)

Louisville & Nashville R.R. Co. v. *Willis,* 83 Ky. 57; *Franklin* v. *Butcher,* 144 Mo. App. 660. Similarly, a negligent interference with the master's contractual right to his employee's services warrants recover for loss of such services. *Ames* v. *Union Ry.,* 117 Mass. 541; *Attorney-General* v. *Valle-Jones,* [1935] 2 K.B. 209; cf. *United States* v. *Standard Oil Co.,* 332 U.S. 301, 312.

That Section 2680(h) excludes from Tort Act coverage negligent as well as intentional torts has been recognized by six courts of appeals in at least nine cases. The Third Circuit held that the exclusion applies to claims of negligent interference with contract rights. *Dupree* v. *United States,* 264 F. 2d 140, certiorari denied, 361 U.S. 823. The Eighth Circuit ruled that a negligent battery was excluded from coverage. *Moos* v. *United States,* 225 F. 2d 705. In the other cases, the courts uniformly held that the section exempted the United States from liability for negligent misrepresentation. *Jones* v. *United States,* 207 F. 2d 563, 564 (C.A. 2),[*] certiorari denied, 347 U.S. 921; *National Mfg. Co.* v. *United States,* 210 F. 2d 263, 275–276 (C.A. 8), certiorari denied, 347 U.S. 967; *Clark* v. *United States,* 218 F. 2d 446, 452 (C.A. 9); *Miller Harness Co.* v. *United States,* 241 F. 2d 281 (C.A. 2); *Anglo-American and Overseas Corp.* v. *United States,* 242 F. 2d 236 (C.A. 2); *Hall* v. *United States,*

[*] "As 'deceit' [in 28 U.S.C. 2680(h)] means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation, since otherwise the word 'misrepresentation' would be duplicative. The construction is strengthened by the inclusion of libel which may be either negligent or intentional."

274 F. 2d 69 (C.A. 10); and, as already noted, the court of appeals in the present case properly ruled that the exception includes negligent as well as wilful misrepresentation. 281 F. 2d 596 (R. 59–60).

B. THE GRAVAMEN OF RESPONDENTS' CLAIM IS NEGLIGENT MISREPRESENTATION; IT IS THEREFORE EXCLUDED FROM FEDERAL TORT CLAIMS ACT COVERAGE

Respondents' claim plainly stems from a negligent "misrepresentation," within the meaning of Section 2680(h). At bottom, their position is that they were misled by the communicated "Statement of FHA Appraisal" indicating an appraised value of $22,750. Although their complaint in terms seeks recovery for negligence in F.H.A.'s inspection of the property (R. 1–3), the written opinion of value was a *sine qua non* in the chain of causative events on which the claim is founded. In the words of the statute, the claim is one "arising out of" misrepresentation.

1. The court below held that respondents could go behind the representation and thereby avoid the bar of Section 2680(h) simply by charging negligence in the inspection of the property. But the appraisal inspection may not thus be separated from the statement of appraisal on which respondents claim to have relied. The effect of Section 2680(h) "cannot be avoided by alleging negligence in the act of testing rather than in the words of the representation because in either case the claim 'arose out of' misrepresentation; if there had been no misrepresentation the plaintiff would not have been damaged." *Anglo-American and Overseas Corp.* v. *United States,* 144

F. Supp. 635, 637 (S.D.N.Y.), affirmed, 242 F. 2d 236 (C.A. 2).

In the *Anglo-American* case, the Food and Drug Administration had inspected a quantity of imported tomato paste and issued a "release notice" certifying that the merchandise did not violate statutory pure food standards. On the strength of this notice, Anglo-American purchased the paste and attempted to deliver it to a government agency, pursuant to a previous contract. The agency refused to accept delivery upon determining that the paste was in fact adulterated. In its suit under the Tort Claims Act to recover for the loss thereby sustained, Anglo-American charged actionable negligence solely on the basis of the Food and Drug Administration's inspection of the paste. Nevertheless, the district court and the court of appeals both held that the claim was excluded by Section 2680(h) because it arose out of the negligent misrepresentation embodied in the release notice.

More recently, in *Hall* v. *United States*, 274 F. 2d 69, the Tenth Circuit held a complaint alleging negligence in the testing of plaintiff's cattle for disease to constitute a misrepresentation claim within Section 2680(h). Plaintiff asserted that the government inspectors had, as the result of negligent testing for brucellosis, erroneously determined that his cattle were diseased; that this fact was made known to him; and that he had accordingly been forced to dispose of his herd at less than its fair market value. The court stated (274 F. 2d at 71):

> If we take the literal meaning of the language of the complaint, it seeks to recover damage

resulting from the negligent testing of the cattle for which there would be liability. But there is no claim that because of negligent testing these cattle suffered physical damages * * *.

We must then look beyond the literal meaning of the language to ascertain the real cause of complaint. Plaintiff's real claim is that because of the negligent manner in which these tests were made, the result showed that plaintiff's cattle were diseased; whereas, in fact, they were free from disease and that the Government misrepresented the true condition of these cattle. Plaintiff's loss came about when the Government agents misrepresented the condition of the cattle, telling him they were diseased when, in fact, they were free from disease. The claim is that this misrepresentation caused plaintiff to sell his cattle at a loss. This stated a cause of action predicated on a misrepresentation.

The question also arose in *Social Security Adm'n* v. *United States,* 138 F. Supp. 639 (D. Md.). The United States from time to time audited the books of a federal credit union. Though an employee of the credit union was engaged in embezzlement of funds commencing in 1945, the United States did not discover this fact until 1953. Prior to that time it had reported to the credit union that its books were in proper order. After the discovery of the embezzlement, the credit union brought an action for damages under the Tort Claims Act, alleging negligence in the conduct of the audits. The district court

held that the tort, if any, consisted of misrepresenting that generally accepted audit standards had been followed and that no irregularities existed. Therefore, the action was barred by 28 U.S.C. 2680(h).

To similar effect, *i.e.*, that the Act's exceptions cannot be avoided by artificially formulating a cause of action under a covered category, are the Fourth Circuit's decisions in *Stepp* v. *United States*, 207 F. 2d 909, certiorari denied, 347 U.S. 933 (claim for negligence rejected because facts showed assault and battery, which is also excepted by Section 2680(h)), and *Broadway Open Air Theatre* v. *United States*, 208 F. 2d 257 (claim for wrongful conversion rejected because it really arose in respect of the collection of taxes, within the exception in 28 U.S.C. 2680(c)). And see *Dupree* v. *United States*, 264 F. 2d 140 (C.A. 3), certiorari denied, 361 U.S. 823 (interference with contract rights); *Alaniz* v. *United States*, 257 F. 2d 108 (C.A. 10) (assault and battery); *Klein* v. *United States*, 167 F. Supp. 410 (E.D.N.Y.) (false imprisonment); *Rufino* v. *United States*, 126 F. Supp. 132, 137 (S.D.N.Y.) (assault and battery); *Moos* v. *United States*, 118 F. Supp. 275 (D. Minn.), affirmed, 225 F. 2d 705 (C.A. 8) (assault and battery); *Duenges* v. *United States*, 114 F. Supp. 751 (S.D.N.Y.) (false imprisonment and arrest).

There is thus no justification for going behind an alleged injury caused by a misrepresentation to seek to rely on antecedent negligence. The unbroken line of authority on this question is precisely to the contrary. Here, as in the numerous other cases where

claimants under the Tort Claims Act have not been permitted to avoid the statutory exceptions by clever pleading, appellees may not escape the misrepresentation exclusion by couching their claim solely in terms of negligence in the appraiser's inspection. The proximate cause of their loss was not the negligent F.H.A. examination of the property—for until they learned the results of that inspection they did not suffer, and could not suffer, any harm from it. The communication to, and receipt by, them of the statement of appraisal was the nexus between the inadequate appraisal and their reliance on it. Accordingly, their claim necessarily "arose out of" a misrepresentation, *i.e.*, the communication to them of the appraised value determined as a result of the inspection. It is precisely this type of claim that Congress expressly excluded, in Section 2680(h), from coverage under the Act.

2. The consistent holdings under the Tort Claims Act, that a plaintiff may not avoid the impact of the misrepresentation exception by ignoring the misrepresentation and alleging that all of its consequences actually flowed from some antecedent negligence, are consonant with general common-law principles.

While the common law of misrepresentation varies as between individual American jurisdictions, the commentators are in agreement as to the types of conduct which fall within the category of negligent misrepresentation. Responsibility for this tort may rest upon negligence in the "manner of expression * * *," failure to use "reasonable care in ascertain-

ing the facts * * *," or "absence of the skill and competence required by a particular business or profession." Prosser, *Law of Torts*, p. 541 (2d ed., 1955); see also *Restatement, Torts*, Sec. 552; 1 Harper & James, *Law of Torts*, § 7.6 (1956); Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 Harv. L. Rev. 733. Negligent misrepresentation is not confined to cases where information is communicated in a negligent manner, but extends as well to cases where, as here, a representation of fact or professional opinion is based upon a negligent investigation.

The leading American case of *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441; 74 A.L.R. 1139, is illustrative. There, the defendants, a firm of public accountants, were employed by Stern & Co. to prepare and certify a balance sheet exhibiting the condition of its business. After completion of an audit, the balance sheet was prepared, showing capital and surplus intact, and defendants attached their certificate stating that the balance sheet, " 'in our opinion, presents a true and correct view of the financial condition of * * *' " Stern & Co. as of a given date. 255 N.Y. at 174, 174 N.E. at 442.

Plaintiff, relying on the balance sheet as certified, extended credit to Stern & Co. Shortly thereafter, Stern went bankrupt. Plaintiff charged that defendants had been negligent in the conduct of the audit for failing to discover that the company was in fact insolvent at the time the audit was made. The court characterized the suit as one "in tort for damages suffered through the *misrepresentations of ac-*

*countants, the first cause of action being for misrepresentations that were * * * negligent * * * .*" 255 N.Y. at 173, 174 N.E. at 442. (Emphasis added.)

Of particular significance is the English case of *Cann* v. *Willson*, [1888] 39 Ch. D. 39, in which the facts were strikingly similar to those in the case at bar. A landowner, desiring to obtain a mortgage loan on the security of his property, employed the defendants to make a valuation. After surveying and inspecting the premises, they informed the owner's solicitors, in writing, of their valuation. Later, on being specifically advised by the solicitors that the valuation was to be used in obtaining a mortgage, defendants reconfirmed the validity of their appraisal. Plaintiffs, in reliance on defendants' valuation and representations (as communicated to them by the owner's solicitors), made the loan and took a mortgage on the premises as security. The owner subsequently defaulted, and the property was discovered to be worth substantially less than the valuation. In plaintiffs' suit to recover damages from the appraisers on account of their failure to use the "proper care, skill, and diligence in making the valuation * * *"[61] the court held, *inter alia*, that they were liable for misrepresentation.[62]

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[61] 39 Ch. D. at 40.

[62] In *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, the Court of Appeal held that *Cann* v. *Willson* had been overruled by *Derry* v. *Peek* (1889), L.R. 14 App. Cas. 337. *Derry* v. *Peek* is the source of the English rule that an action for negligent misrepresentation may not be maintained unless there is a "contractual nexus or a fiduciary relationship between * * *" the parties. *Candler* v. *Crane, Christmas & Co.*, [1951] 2 K.B. 164, 196 (C.A.).

The court below erroneously relied upon *Glanzer* v. *Shepard,* 233 N.Y. 236, for the contrary proposition (R. 64). In that case, the seller of beans requested the defendants, public weighers, to certify the weight and to furnish the buyer with a copy. This the defendants did. Their certificate was made out in duplicate, one copy to the seller and the other to the buyer. The buyer paid the seller on the faith of the certificate, which turned out to be in error. Though the court stated, through Judge Cardozo, that the defendants were being held for both their "careless words" and their "careless performance of a service" (233 N.Y. at 241), it is clear that the proximate act that injured the buyers and upon which liability was predicated was the "deliberate certificate," containing a misrepresentation of the weight of the beans, and "intended to sway conduct." Judge Cardozo himself explained the *Glanzer* decision in just such terms, when he stated that *Glanzer* "committed us to the doctrine that *words,* written or oral, if negligently published with the expectation that the reader or listener will transmit them to another, will lay a basis for liability though privity be lacking." *Ultramares Corp.* v. *Touche,* 255 N.Y. 170, 181–182 (emphasis added). See also *Doyle* v. *Chatham & Phenix Nat'l Bank,* 253 N.Y. 369; *International Products Corp.* v. *Erie R.R. Co.,* 244 N.Y. 331.

In short, the general law of torts recognizes a wrong such as respondents assert here as the tort of *misrepresentation.* The injury is done, not by physical

conduct, but by the communication of words which mislead, to the reader's (or the hearer's) detriment.

3. The court of appeals below sought to distinguish this case from the other decisions under the Tort Claims Act which have held claims for misrepresentation to be excluded from coverage, see pp. 34, 38–39, 40–42, *supra*, on the ground that here the misrepresentation was a breach by F.H.A. of "a specific duty owed to the plaintiffs as purchasers of the property" (R. 62). That duty, in the court's view, was to take care not to appraise property at an inflated value. The distinction is without substance. As we have pointed out, even if there were such a duty (but see, *supra*, pp. 15–30), the fact remains that, absent the misrepresentation of the property value, the respondents would have gone unharmed. The misrepresentation was the critical factor.

Moreover, an examination of the decisions which the court below attempts to distinguish shows that, in fact, the duty not to misrepresent in those cases is no less specific than that (if any) owing to respondents here. In *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C.A. 7), certiorari denied, 347 U.S. 967, and in *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9), the information concerning flood conditions published by government employees was specifically for the benefit of the plaintiffs who were among the class of persons likely to be affected by the flood. In fact, in the *Clark* case one of the communications

on which liability was predicated was specifically addressed "To the Residents of Vanport."[63]

Likewise, in *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10),[64] the primary interest in not having healthy cattle represented as diseased would be the interest of the owner of the cattle who relies upon the representation of the government agent.[65] The same is true for the representation as to the condition of the tomato paste in *Anglo-American and Overseas Corp.* v. *United States*, 242 F. 2d 236 (C.A. 2), *supra*, pp. 39–40. Finally, it is clear that the audit made in *Social Security Adm'n* v. *United States*, 138 F. Supp. 639 (D. Md.),[66] was for the benefit of the credit union and its members. In this connection, it should be noted that in the instant case neither F.H.A. nor the appraiser knew at the time of the appraisal that respondents were interested in buying this specific property (R. 15); the appraisal was therefore undertaken for the benefit of a general class of potential mortgagors, not specific individuals.

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[63] 218 F. 2d at 449. Though the courts in the *National Mfg.* and *Clark* decisions, as one ground for their decisions, held that the government owed no duty to anyone to take care to ascertain flood conditions correctly, the court's alternative discussion of the applicability of the misrepresentation exception to the Federal Tort Claims Act clearly was premised *arguendo* on an assumption that a duty was owing.

[64] Discussed at pp. 40–41, *supra*.

[65] Respondents suggest (see Br. in Opp. 4, fn. 2) that in the *Hall* case the duty was owed to the public, not to the cattle-owner. The Tenth Circuit, however, wrote as if the duty, if any, were owed to the plaintiff. See *supra*, pp. 40–41.

[66] Discussed at pp. 41–42, *supra*.

4. Similarly, the court below sought to limit the range of the "misrepresentation" exception by equating the present case with situations in which negligent conduct by the government, misleading the plaintiff, has been held actionable under the Tort Claims Act. The court relied, for instance, on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (holding the United States liable for negligent failure to keep a lighthouse operating), and *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4) (finding liability for failure properly to mark a submerged wreck) (R. 62). But those cases differ significantly from this one. Far more than misleading words was involved. The government's negligence consisted in physical conduct which was an integral part of the physical direction or guidance of private action—just as a policeman directs traffic, or a driver signals with his hand or directional lights. It is not surprising that, as the opinion below remarks (R. 62), cases like these contain no discussion of the misrepresentation exception. The government made no such claim because it recognized that to attempt to apply Section 2680(h) to such circumstances would go counter to the congressional purpose by stretching the misrepresentation exemption far beyond its meaning in traditional legal usage. By like token, to use the decision in *Indian Towing Co.* v. *United States* to narrow the misrepresentation exception would conflict with the intention of Congress in enacting Section 2680(h).

In the reading of the court below and of respondents, the misrepresentation exclusion would operate

only where there is no "pre-existing duty of care related to the activity of the government employee" (see Br. in Opp. 4), *i.e.*, only where the sole negligent or wrongful conduct of the government employee lies in the *communicating* of the words. In effect, this interpretation reads the exception out of the Tort Act. The instances in which the only duty of care arises in connection with or as a result of making the representation are few and far between. In the theory and practice of the law of torts, "misrepresentation" has not been so narrowly conceived (see *supra*, pp. 39–47).

5. Finally, it is appropriate to point out the potential consequences of the ruling below in areas outside the concern of F.H.A. There are many fields in which the federal government communicates information to its citizens, for their aid and guidance, and several in which Congress has specifically indicated that such information is to be distributed. A registration statement filed with the Securities and Exchange Commission, and reviewed by that agency, is of course for the guidance of possible investors. The Department of Agriculture makes available a mass of information for use by farmers and the citizenry generally; the Labor and Commerce Departments have similar programs. The cases cited above, pp. 34, 38–39, 39–42, illustrate governmental activities of this type. As Judge Johnsen observed, concurring in *National Mfg. Co.* v. *United States*, *supra*, 210 F. 2d 263, 280 (C.A. 8), certiorari denied, 347 U.S. 967, the "examples could be endlessly compounded, and the amount

of liability that they would involve might be infinite." They could include (*ibid.*) regarding "the Government as having an obligation, for example, to pay a flour miller for the loss sustained by him in relying upon an erroneous agriculture-department report of wheat-crop shortage and having purchased wheat on that basis to take care of his milling needs; or to pay a plumber for his loss from having stocked up on a supply of unmovable bath tubs in reliance upon an erroneous commerce-department census as to the number of homes in his community that are without this facility; or to pay a laborer for his expense and loss of wages in having given up his job and migrated to California in reliance upon some erroneous labor-department statistics as to the amount of work there available in his field or skill."

Contrary to the theory of the opinion below, the "misrepresentation" exception was designed to cover all such communications of information.

CONCLUSION

For the reasons stated, the judgment below should be reversed, and the cause remanded with instructions to dismiss the complaint for want of jurisdiction.

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